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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other Customer	)	
Information	)	

OPPOSITION TO PETITIONS FOR RECONSIDERATION

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SUMMARY OF ARGUMENT

In telecommunications competition, the "win-back" campaign is trench warfare. The campaign is fought customer-by-customer at the time the subscriber decides to change providers. Using its CPNI, special promotions, and never-before-offered low prices, the incumbent carrier seeks to undercut its competitors. The dominant carrier can afford to offer special low rates to targeted customers, where the result may delay strong competition for the larger customer base paying higher prices. The Commission correctly concluded that Congress prohibited such predatory practices.

Using CPNI to "regain" or "retain" a former customer who is switching carriers is not a permissible use of a customer's information. Congress limited use of CPNI to providing subscribed service. A "win-back" campaign markets new services to former customers. "Win-back" campaigns also are anticompetitive and involve the use of predatory pricing packages to prevent effective market entry.

CPNI is not the sole property of the carrier, but is the property of the customer. As custodian of customer information, the carrier's interest does not amount to a property right free from government regulation. There is no "taking" of Petitioners' property which requires compensation under the Constitution. Congress may regulate the anti-competitive practices of an industry long subject to market domination and the exercise of monopoly power.

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OPPOSITION TO PETITIONS FOR RECONSIDERATION

KMC Telecom, Inc., by its attorneys, hereby opposes the Petitions for Reconsideration filed by incumbent local exchange carriers and their trade association[1] ("Petitioners") to the extent the Petitioners seek to change, delete, or modify the Federal Communications Commission's ("Commission" or "FCC") rule prohibiting the use of Customer Proprietary Network Information ("CPNI") in "win-back" campaigns.

KMC is a competitive telecommunications carrier offering facilities-based and resale local telecommunications services. KMC has interconnection and resale agreements in various states with incumbent local exchange carriers (ILECs) under the Telecommunications Act of 1996 (the Act). As a new market entrant to historically closed markets, KMC is subject to substantial competitive

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[1] KMC opposes the Petitions for Reconsideration filed by United States Telephone Association, SBC Communications, Inc., BellSouth Corporation, Bell Atlantic, AT&T Corp., GTE Service Corporation, Frontier Corporation, and ALLTEL Communications, Inc.

disadvantages in competing with the ILECs, including Petitioners. The ILECs possess monopoly power and control telecommunication services access to customers in their local markets.

I. Petitioners Request Reconsideration of the Rule Prohibiting Use of CPNI in "Win-Back" Campaigns

Petitioners seek reconsideration of the Commission's rule prohibiting the use of CPNI to regain former customers, or "retain" customers who have given notice of termination but have not yet been switched to a new carrier.[2]

> A telecommunications carrier may not use, disclose or permit access to a former customer's CPNI to regain the business of the customer who has switched to another service provider.[3]

This rule prohibits carriers from using CPNI in marketing to former and soon-to-be former customers:

> We also do not believe, contrary to the position suggested by AT&T, that Section 222(d)(1) permits the former (or soon-to-be former) carrier to use the CPNI of its former customer (*i.e.*, a customer that has placed an order for service from a competing provider) for "customer retention" purposes.[4]

The Petitioners argue that a different "construction" or "interpretation" of the statutory language would be more consistent with the "public interest."[5] Petitioners further argue that

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[2] Such activities are commonly referred to as "win-back" campaigns

[3] 47 CFR § 64.2005 (c)(3)(1998).

[4] *In Re Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Second Report and Order, and Further Notice of Proposed Rulemaking, FCC 98-27, slip op. at 66, ¶85 (released February 26 , 1998) (hereinafter, *"CPNI Second Report"*).

[5] United States Telephone Association (USTA) Petition, 6-7. While similarly objecting to the FCC's "interpretation" of the statute, GTE also argues that Section 222 does not specifically prohibit customer "win-back" campaigns, and that Section 222 (d) permits carriers to "render"

permitting use of CPNI for "customer retention" purposes is "pro-competitive", and that other industries are not so constrained in contacting former customers.[6] Finally, Petitioners argue that prohibiting dominant carriers from using CPNI to "retain" former customers through "win-back" campaigns deprives them of their property rights in CPNI in violation of the Fifth Amendment taking clause.[7]

The Commission's application of Section 222(c) regarding "win-back" campaigns correctly applied the law and Congressional intent. Furthermore, Petitioner's Fifth Amendment taking argument is misplaced and invalid.

II. Carriers Use CPNI in "Win-Back" Campaigns to Thwart Competition

Competitive carriers offer new, innovative, and competitively priced telecommunications services to the public. Competitive carriers by necessity must interconnect with and/or resell the services of the dominant local exchange carriers, whose facilities or services create "bottlenecks" to providing telecommunications services to customers.

The ILECs act as both wholesalers of communications services and facilities to competitive carriers, and as dominant retail competitors offering the same or similar services to the public. The wholesale function gives the ILECs enormous access to detailed information on a competitive

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service to customers, and thus, engage in "win-back" campaigns to "retain" them. GTE Petition at GTE fails to note that soliciting a customer who has changed carriers is not "rendering" service under the Section 222 (d) exceptions.

6 *Id.*, at 8. See also BellSouth Petition at 16-17;

7 *See, e.g.*,GTE Petition at 36-38; BellSouth Petition at 18.

carrier's activities, customers, and business strategies. which the ILECs store, retrieve, and use to compete in the retail market.

When the competitive carrier obtains a new customer, either the customer or the carrier notifies the "bottleneck" carrier of the change. Such notification is necessary, because the "bottleneck" carrier is acting in its capacity as a wholesaler whose services are being resold or with whom interconnection is necessary. The wholesale carrier must make changes in its billing and other records and facilities to reflect the customer change, and to provide additional services to the competitive carrier. The ILECs are compensated for all these additional services.

This is a most vulnerable time in a new customer relationship, because the service change-over in many instances has not occurred, or new service only recently has begun. Not surprisingly, competitive carriers have experienced many types of resistance from the ILECs during the customer change-over period.[8] One of the more pernicious problems is the "win-back" campaign.

Upon receiving notice of a carrier service change, the carrier causes its retail marketing unit to use CPNI to propose new pricing packages to its former customer.[9] These packages can be offered as "promotions" of less than 90 days duration, or as Contract Service Arrangements specific to the customer. These packages are generally neither under tariff nor disclosed to competitive carriers,

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[8] ILECs charge high fees ranging from $10 - $40 per customer for any change in carrier. These fees are collected either as Operational Support Services (OSS) "Order Change Per Account" charges, or separately from OSS charges, as a "Customer Transfer Charge" or "Migration Charge".

[9] Using CPNI, these "special rate" offerings may represent special contract service arrangements for the former customer.

under exceptions to resale offerings. Thus, it is difficult for a competitive carrier to learn of the promotions, or know the basis for the offer to the subscriber.

The wholesale carrier most often controls the technology necessary to make or complete the change in service. If the service change-over is delayed for any reason, the customer sometimes blames the new carrier, and decides not to change service. Thus, upon obtaining information on a customer service change in its **wholesale** capacity, the ILEC uses that new information, and its superior supply of CPNI, in its **retail** capacity, to undercut the competitive carrier's successful marketing to the ILEC's former customer.

III. Congress Intended to Prohibit Carriers From Using CPNI To "Win-Back" Former Customers

Petitioners argue that the Commission does not have the authority to restrict the use of CPNI in "win-back" campaigns, because Congress placed no restrictions on the use of CPNI in "win-back" marketing.[10] The plain language of the statute and an analysis of Congressional intent does not support Petitioners' argument.

Congress expressly restricted the use of CPNI in carrier marketing, out of concern for both competitive and privacy interests:

> In general the new section 222 strives to balance both competitive and consumer privacy interests with respect to CPNI.[11]

Congress limited CPNI use in marketing campaigns through a number of provisions. First, Section 222(a) requires all carriers to protect the confidentiality of information obtained from carriers and

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[10] *See* GTE Petition at 33; Frontier Petition at 8; AT&T Petition at 2.

[11] Telecommunications Act of 1996, Conference Report, 4 U.S. Code & Cong. News 219 (1996).

customers.[12] Second, Section 222(b) prohibits a carrier from using information from another carrier in marketing campaigns *of any type*, including "win-back" campaigns.[13]

Finally, Congress further restricted marketing campaigns in Section 222(c) by limiting a carrier's use of CPNI to the provision of existing services:

> Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall **only** use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B)services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.[14]

This Section 222 (c) only permits use of CPNI in the provision of the "...service from which such information is derived....", or the provision of related services, absent customer approval.

One of Congress' primary purposes in passing the Act was to reverse decades of monopoly control and dominance over the delivery of local exchange and other telecommunications services:

> For much of the past 60 years, the provision of local telephone service has been a monopoly service, and the telephone companies operating today have been the monopoly suppliers.
>
> * * *
>
> The bill has three main components. First, the bill promotes competition in the market for local telephone service by requiring

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12 47 USC § 222 (a).

13 47 USC § 222 (b).

14 47 USC §222 (c)(1) (emphasis added).

> local telephone companies (or "local exchange carriers") to offer competitors access to part of their networks.[15]

The perpetuation of telecommunications monopolies and dominant carriers has presented one of the nation's most protracted and difficult antitrust problems. Congress passed the Act to supplement existing federal anti-trust legislation.[16]

Congress enacted remedies designed to eliminate anti-competitive practices specific to the local exchange telecommunications markets, much as the Justice Department and courts a decade earlier had designed special remedies to open the long distance market to competition.[17] Congress realized that, in order to break up local monopolies, reduce market dominance in other markets, and encourage new entry to historically under-competitive markets, the incumbent carrier's customer base had to be opened effectively to competition, and the incumbent carrier's use of CPNI had to be regulated. Congress recognized that it was just as necessary to regulate CPNI and Carrier Information as it was to regulate the resale and interconnection markets themselves.[18] Thus, Congress required the Commission to strictly limit the use of CPNI and Carrier Information through regulation.

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[15] Telecommunications Act of 1996. House Report No. 104-204, (104th Cong., 2d Sess.) 1996 U.S. Code & Con. Admin. News 10, at 11,12.

[16] Congress specifically enacted a "savings clause" which permits application of the general anti-trust laws and the specific remedial provisions of the Act. Telecommunications Act of 1996, Pub. L. 104-104, Title VI, § 601(b)(1), Feb. 8, 1996, 110 Stat. 143. "SAVINGS CLAUSE: – Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."

[17] *See United States v. AT&T*, 522 F. Supp.131 (D.D.C. 1982).

[18] Congress' regulation of CPNI is quite similar to the Commission's decisions a decade earlier that limits should be placed on dominant carrier's use of CPNI in the enhanced services markets. *See, In re Amendment to Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)* 62 P&F Rad. Ref. 2d 1662, 1711 (1987).

Given Congress' expressed concern about limiting the competitive uses of CPNI, and given the statutory restrictions it imposed, the Commission recognized that the "win-back" campaign presented a serious threat to effective entry into telecommunications markets.

IV. The Commission Properly Implemented Congressional Intent to Promote Competition and Protect Consumer Privacy

A. "Win-Back" Campaigns Do Not Involve the "Provision of Service"

The FCC properly found that "win-back" campaigns to "retain" or "regain" former customers were not permitted uses of CPNI under Section 222. The Commission cited three reasons:

(a) The use of CPNI to retain a customer "that had already taken steps to change its service provider" was not carried out in the "provision of service" under Section 222(c)(1);[19]

(b) A carrier is not "initiating" service to a former customer under Section 222(d)(1) when it uses CPNI, but instead is marketing services to which a customer formerly subscribed;[20]

(c) A carrier cannot infer continuing customer approval for the use of CPNI in "win-back" campaigns, because such use is "outside the existing service relationship within the meaning of Section 222(c)(1)(A)."[21]

The FCC correctly concluded that the "win-back" campaign is essentially a marketing effort aimed at offering new service in the future to a former customer, not part of the provision of existing service under a continuing customer relationship. Since Congress limited CPNI use to the provision of

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19 *Second Report and Order*, 67 ¶ 85.

20 Id.

21 Id.

existing or related services, prohibiting the use of CPNI to regain a former customer is the only analysis consistent with Section 222 of the Act.

The fact that a carrier has failed to implement a service change order at the time it engages in "win-back" marketing does not continue the customer relationship. The carrier "retains" the customer after a change order for only a limited time, (a day or two), and any delay to mount a marketing campaign defeats Congressional intent to open historically closed markets to new competition.

B. Use of CPNI In "Win-Back" Campaigns Discriminates Against Competing Carriers and Is an Unreasonable Practice Prohibited by Section 201 of the Communications Act

The FCC also determined that an incumbent's use of CPNI in certain marketing campaigns which disadvantage competitors was an unreasonable practice prohibited by Section 201(b) of the Communications Act of 1934.[22] The FCC declared that:

> use or disclosure of customer information that unreasonably favors the incumbent LEC to the disadvantage of the competing LEC....

is a discriminatory, anti-competitive practice prohibited under Section 201(b) of the Act. [23]

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[22] Section 201(b) requires that "all practices...in connection with...communications service, shall be just and reasonable, and any such practice...that is unjust or unreasonable is declared to be unlawful." 47 USC § 201(b)(1934).

[23] The Commission also observed that some uses of CPNI by a carrier providing service also could discriminate against competitors, and are thus anti-competitive. For example, the FCC observed that tracking customer service records to prevent a customer from subscribing to competitive services was anti-competitive. *Second Report and Order*, 46-47, ¶59:

> As the Commission has found in the past, such anticompetitive use of CPNI violates the basic principles of competition, and to the extent such practices rise to the level of anticompetitive conduct, we can and will exercise our authority to prevent such discriminatory behavior.

The CPNI which incumbent carriers use in "win-back" campaigns is not available to the competitive carrier. It is CPNI obtained from the customer as part of the monopoly and "bottleneck" position the incumbent occupies in the market. Nevertheless, the competitive carrier has succeeded in obtaining the customer's business despite the ILEC's built-in advantages. Telecommunications markets will not be opened to new competitors if dominant carriers can use customer information to: (a) obtain a market advantage, and (b) negate a competitor's successful marketing by undercutting prices based on customer information.

C. "Win-Back" Campaigns Are Not Pro-Competitive

Petitioners argue that use of CPNI in "win-back" campaigns is pro-competitive, because such campaigns result in new service to customers at reduced prices.[24] Petitioners limit their analysis to two factors: (a) whether the customer receives a lower price through Petitioner's use of CPNI to retain or regain the customer, and (b) whether Petitioners are permitted to use their CPNI in communicating with the customer. Petitioners implicitly admit that they undercut the pricing package offered by a competitor only after the former customer orders a change in service.

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[24] *See, e.g.*, USTA Petition at 7; GTE Petition at 36; BellSouth Petition at 17. Petitioners' argument presumes that Congress has not already decided when use of CPNI is in the public interest. By limiting use of CPNI to the provision of existing services in Section 222 (c)(1), Congress determined that use of CPNI to market to new or former customers was not in the public interest. Congress believed that opening markets to competition ultimately would result in lower prices. *House Report, supra,* 1996 U.S.Code Cong. & Admin. News at 56: ("The protections contained in 222(b) and (c) represent a careful balance of competing, often conflicting, considerations.")

Use of CPNI to offer lower prices in a "win-back" campaign amounts to a predatory practice designed to prevent effective market entry by a new competitor. The anti-trust laws have long found that predatory pricing schemes are anti-competitive.

Dominant carriers are able to use their superior size and access to customer information to under-cut competitor's prices, and thus delay effective market penetration. In many markets the dominant carrier may control up to 98% of the local exchange market, and as much as 60% of the mobile telephone business in the same market area, through its wireline cellular license.[25] The impact on the monopoly service provider of such "lower prices" to a few customers is negligible. The anti-competitive impact on new entrants and market competition can be devastating.

Under present circumstances in the local exchange and long distance markets, it is well within Congress' legislative power, and the Commission's rule-making authority, to prohibit use of "CPNI" in "win-back" campaigns under Section 222(c)(1), and as an unfair practice under Section 201 of the Communications Act. The long-term "public interest" demands strong competitors with a substantial market share who compete fairly and effectively on the offering of innovative competitive services and prices.

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[25] "AT&T has slightly more than 50 percent of the $75 billion a year long-distance market", and is thus a dominant factor in that market. "AT&T Trying to Buy TCI", Washington Post, pp 1, 10 (June 24, 1998).

D. A Carrier Is Not Permitted to Obtain Customer Approval to Use CPNI in "Win-Back" Campaigns

A potentially open question, not addressed by Petitioners, is whether "customer approval" can be obtained to permit a carrier to engage in a "win-back" campaign.[26] The FCC's rule does not provide for customer consent. The absence of a "customer approval" exception for "win-back" campaigns is both logically correct under the law and necessary to promote competition.

Section 222(c)(1) permits use of CPNI, other than in the provision of the service subscribed to, with "customer approval." However, at the time of the "win-back" campaign, the target of the campaign is a former, or soon-to-be former customer. Approval is not permitted by law, because the approval is not being sought from a "customer."

Thus, once an order to change service is given, the carrier is prohibited by Section 222(c)(1) from using the CPNI in its possession for marketing purposes. If it wishes to compete to regain the customer, it must do so on the same level playing field as the new carrier, with whom the customer did not have a previous relationship. Otherwise, Congress would have given the former carrier a built-in information and marketing advantage in offering customer-specific service and pricing packages, which would tend to delay and prevent effective competition.

The customer relationship continues, however briefly, only by failure of the carrier to implement an ordered change in service. Any other conclusion would encourage delays in customer change orders to mount marketing campaigns.

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[26] AT&T construes Section 64.2005(b)(3) as permitting customer approval, but that subsection contains no such provision. Compare § 64.2005(b)(1), which contains an express "customer approval" provision. *See* A&T& Petition at 3.

Permitting "customer approval" would completely undercut any restriction on "win-back" campaigns. If a former customer were asked to give approval for use of its records to see if a lower price for service could be offered, the "teaser" would be irresistible. Few customers would refuse, and the "win-back" campaign would be off and running after one question and a corresponding computer command. The anti-competitive effects of "win-back" campaigns on competitive market entry would proceed unchecked.

V. The Commission's CPNI Rules Do Not Constitute A Taking of Carrier's Property

A. Customer Proprietary Network Information is Not the Property of the Carrier

GTE argues that CPNI is a carrier "trade secret." and is protected against a "taking" of property under the Fifth Amendment to the U.S. Constitution. GTE further argues that, in prohibiting GTE from using its "property" in "win-back" campaigns, a "taking" without just compensation has occurred.[27] While the Commission previously rejected the "taking" argument,[28] GTE's "trade secret" claim merits further discussion.

CPNI is not the carrier's exclusive property. Congress made clear that CPNI is the customer's property, in which the customer has proprietary and privacy interests:

> The term "customer proprietary network information" means -
>
> (A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the

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[27] GTE Petition at 36 - 37. BellSouth cites no support for its similar claim. BellSouth Petition at 4.

[28] *See* CPNI Second Report at 33, ¶ 43.

> carrier by the customer solely by virtue of the carrier-customer relationship.[29]

CPNI is information generated as a result of a customer's own activities on the carrier's network. The customer has a reasonable expectation of privacy, in its use of telecommunications services, just as it has a reasonable expectation of privacy in the contents, delivery and destination of communication via mail. Congress was careful to limit its definition of CPNI to information which the customer directly or indirectly "made available"[30] to the carrier through its subscription to the carrier service. This is information in which the customer has a proprietary interest, including an expectation of privacy and limitation on its use, even as to the carrier itself.

Indeed, much of CPNI is not exclusive to a single carrier. Exclusivity is an important tenet of GTE's assertion of a property right in the information. Call completion, to a great extent, will involve two carriers who capture or share the same information. If, as GTI contends, the carrier had an absolute property interest in such information, the customer would have no expectation of privacy or rights to limit the use or sale of the information. Obviously, this is not the case, and GTE's customers would be surprised to learn that GTE asserts exclusive property rights over its customer's information, and to use, sell, assign, or dispose of customer records as it desires.

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[29] 47 USC § 222(f)(1)(A). (emphasis added)

[30] Information "made available" through customer subscription would include information generated directly by the customer through calls made, for example, or developed indirectly, for example, through calls received. The customer would also have a reasonable expectation of privacy regarding information retrieved and stored in order to render a bill. The customer indirectly pays for retrieval and storage of information on its use through rates charged for services; the carrier's capture, storage, and billing use of information on a customer's use of the carrier network does not thereby entitle the carrier to assert a property right in the information, since the storage and retrieval is part of the provision of and billing for service for which the customer contracts in the first instance.

The Commission has long held, without objection, that CPNI belongs to the customer, that the customer has the right to order its service provider to withhold CPNI from marketing personnel, and may release it to competitors:

> In the Phase I Order, we permitted AT&T to use its customer's CPNI in marketing enhanced services provided that it established procedures to honor requests from customers that their CPNI (i) be withheld from AT&T enhanced services personnel and (ii) be released to their enhanced services vendors.[31]

GTE was made subject to similar rules.[32]

GTE can cite to no case holding that consumer information made available to a telecommunications service provider, in the highly regulated telecommunication service industry, is considered a "trade secret" of the regulated carrier. Indeed, GTE relies only on a vague and broad definition of "trade secrets" in the Restatement of Torts to support its position.[33]

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[31] In Re Amendment to Section 64.702 of the Commission's Rules and Regulations, (Third Computer Inquiry) 62 P & F Rad. Reg. 2d 1662, 1711 (1987). On appeal, the Ninth Circuit Court of Appeals affirmed without discussion the FCC's determination that the customer enjoyed property and privacy rights in CPNI. The Court found the FCC's balancing of "the competing interests of competitive equity, customer privacy, and the need for efficiency in the development of mass market enhanced services" to be reasonable. *People of the State of California v. FCC*, 39 F. 3d 919, 930-931 (9th Cir. 1990) (remanded on other grounds).

[32] *In the Matter of Application of Open Network Architecture Safeguards to GTE Corp.*, Report & Order, 9 FCC Rcd. 4922, 4944-45 (1994).

[33] GTE's reliance on *Ruckleshaus v. Monsanto Co.*, 104 S.Ct. 2862 (1984) clearly is inapposite. First, the "trade secret" in issue involved data developed solely by Monsanto in the manufacture of a pesticide. The parties stipulated that the data amounted to a trade secret. 104 S.Ct. at 2872. Here, the CPNI is not developed in the manufacture of a product, but is provided by the customer who uses services offered to the general public.

The only case found which directly addresses the issue reaches a conclusion contrary to GTE's position. In *AT&T Communications of California, et al. v. Pacific Bell, et al.,*[34] the U.S. District Court for the Northern District of California enjoined Pacific Bell from using AT&T's proprietary database in a marketing campaign. The Court held that "all of the information 'contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier' is CPNI", but that:

> "Plaintiffs' databases do not appear on the customers' bills, and therefore the databases are not CPNI, even if some of the data within those databases is."[35]

The Court further observed that Pacific Bell's manipulation of the database to identify and provide marketing incentives to AT&T's best customers violated AT&T's privacy rights in the database under Section 222(a) of the Act:

> This list of Plaintiff's best customers is clearly the sort of proprietary information which Congress intended to protect by enacting section 222(a) of title 47.[36]

The Court held that the databases which AT&T transmits to Pacific Bell are trade secrets, because they are in a "unique proprietary format", even though the information contained therein may be CPNI:

> Plaintiffs have introduced uncontroverted evidence that the databases derive independent economic value from not being known to the

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[34] Case No. C 96-1691 SBA, 1996 WL 940836 (N.D.Cal. 1996)(unpublished). The District Court's entry of a preliminary injunction was affirmed on limited review in *AT&T Communications, Inc., v Pacific Bell,* 108 F. 3d 1384 (9th Cir. 1997)

[35] *Id.*, 1996 WL 940836 at p. 5

[36] *Id.*, at 6.

> public or to competitors, and that the databases are the subject of reasonable efforts to maintain their secrecy.[37]

Thus, the Court found that the databases were "trade secrets", but that the CPNI contained therein was not the exclusive property right of the providing carrier. Pacific Bell was required by Section 222(a) to maintain the confidentiality of information another carrier provided to it, but the Court did not hold that the CPNI itself was AT&T's exclusive property right.

The Supreme Court has recognized that the right to privacy includes individual control of personal information:

> ...both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person.[38]

As society has developed and the storage and access to information became more commonplace, Congress and the courts have increasingly protected the individual's common law property right to control his private information. In listing the numerous instances in which Congress passed legislation protecting consumer privacy rights, a U.S. District Court recently observed:

> These statutes reflect the Congressional desire to keep an individual's right to privacy apace with advances in technology that increase exponentially the chances that an individual's privacy can be breached.[39]

The individual's common law property right, i.e., privacy right, in personal information has not changed as a result of the increased ability of telecommunications carriers to capture, store, and

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[37] *Id.*, at 7.

[38] *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763, 109 S.Ct. 1468, 1476 (1989).

[39] *Dirkes v. Borough of Runnemede*, 936 F. Supp. 235 (D. N.J., 1996).

manipulate information, as GTE would suggest. When Congress enacted Section 222 to protect the individual's historic property rights, it did take property rights GTE enjoyed prior to the Act's passage. GTE has no right of property in stored CPNI which the FCC has taken by restricting certain marketing activities.

As the custodian of information made available by a customer's use of its services, a telecommunications carrier has a duty to protect the customer's common law and statutory rights of privacy. GTE enjoys no property right in customer-supplied information similar to the privately developed pesticide data at issue in *Ruckleshaus v. Monsanto, supra.*

B. There Has Been No "Taking" of a Carrier's "Property" which Entitles a Carrier to Compensation

The *Monsanto* court applied a four-point test for determining when there is a taking of property.[40] The first two points can be restated follows:

1) Does GTE have a property interest protected by the Fifth Amendment Taking clause in the CPNI it is now prohibited from using in "win-back" campaigns?

2) If so, does the FCC's regulation prohibiting certain uses of CPNI effect a taking of that property interest?[41]

It has already been demonstrated that GTE is the custodian of its customers' information, and thus does not enjoy an exclusive property right in the information. Also, a telecommunications carrier's property is subject to regulation in the public interest:

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[40] *Monsanto, supra*, 104 S.Ct. at 2871.

[41] If the last two questions are not resolved in GTE's favor, there is no need to reach the next two questions concerning "taking for a public use" and whether there is "just compensation."

> The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest.[42]

The Supreme Court has observed that corporate entities do not have the same property expectations in custodial information provided to them by customers:

> While they may and should have protection from unlawful demands made in the name of public investigation . . . corporations can claim no equality with individuals in the argument of a right of privacy.... They are endowed with public attributes. They have collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless the enjoining agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with law and the public interest.[43]

In this highly regulated telecommunications industry, it is well within the power of Congress and the Commission to regulate unfair and unjust practices of dominant carriers in the use of information in which the carriers have a custodial responsibility, and not an exclusive property right. Customer information on the use of services is not a patentable new technology, a secret, internally developed procedure, or company financial record in which an exclusive property right could be asserted. While all information related to a carrier's business may have some potential marketing value, the limited regulation prohibiting use of CPNI in "win-back" campaigns imposed by Congress and the Commission does not amount to a taking of carrier property for which compensation is required.

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[42] *General Tel.Co. Of the Southwest v. U.S.*, 449 F.2d 846, 864 (5th Cir. 1971).

[43] *California Bankers Association v. Schultz*, 416 U.S. 21, 194 S.Ct. 1494, 1519 - 1520, (1974), quoting United States v. Morton Salt, 338 U.S. 632 at 651-652, 70 S. Ct. at 368 (1950) (citations omitted).

GTE still is permitted to use CPNI in the legitimate provision of services subscribed to. Thus, it is not deprived of any property necessary or useful in the conduct of its service business. However, restricting the marketing uses of CPNI which tend to harm competition in monopolized markets, or which tend to reduce competition, are proper exercises of federal power.

CONCLUSION

Based on the foregoing, KMC Telecom, Inc. respectfully submits that the Petitions for Reconsideration requesting elimination or modification of the FCC's rule prohibiting the use of Customer Proprietary Network Information ("CPNI") to regain the business of a former customer, should be denied.

Respectfully submitted,

KMC TELECOM, INC.

By: _____

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CERTIFICATE OF SERVICE

I, Yvonne C. Skinner, hereby certify that I have caused to be mailed, on June 25, 1998, via first class mail, postage prepaid, copies of the foregoing "OPPOSITION TO PETITION FOR RECONSIDERATION" to the parties listed below:

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